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Decision 05-07-042, as modified by Decision 06-01-044

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of WilTel Communications, LLC (U-6146-C) aka Williams Communications, LLC, a Delaware Limited Liability Company, to Amend its Certificate of Public Convenience and Necessity.

Application 04-05-017
(Filed May 3, 2004)

OPINION DENYING APPLICATION OF WILTEL COMMUNICATIONS LLC TO AMEND ITS CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

A. Summary

This decision denies the application of WilTel Communications, LLC (WilTel) to amend its certificate of public convenience and necessity (CPCN). WilTel asks us to amend its CPCN in order to allow it to build out certain fiber optic telecommunications facilities without further Commission review or analysis under the California Environmental Quality Act (CEQA). We deny WilTel's application to amend its CPCN on the basis that its CPCN does not contain restrictions on WilTel's future construction, and therefore does not need to be amended as WilTel requests. However, we will add certain restrictions on WilTel's authority in order to limit what WilTel is authorized to construct without Commission review.

Our decision today will change our current practice with regard to WilTel. We have required WilTel to return to the Commission for approval and CEQA review whenever it proposes additional construction. However, CEQA is only triggered when we are called upon to issue a "discretionary decision." We find that, despite our prior practice, WilTel's CPCN does not require it to apply for Commission approval, and we are not required to render a discretionary

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decision, concerning WilTel's extensions within its existing service territory. For these reasons, WilTel need not undergo additional Commission or CEQA review prior to constructing these extensions.

We note that the circumstances that require discretionary Commission decisions vary for different types of carriers and different types of construction. These circumstances include the specific language in the carriers' CPCN, other Commission requirements, and the nature of the construction. Therefore, our decision concerning WilTel today is unique to WilTel and should not be read as applying to other carriers. We are aware that we need to create rules applicable to the industry as a whole through our open rulemaking, R.00-02-003, designed to develop a comprehensive environmental policy for the entire industry sector.

B. Background

The procedural history of this proceeding shows significant back-and-forth communication between WilTel and Commission staff in an attempt to conform this application to the Commission's interpretations of its CEQA obligations.

WilTel first filed its application on May 3, 2004. On June 2, 2004, the assigned Administrative Law Judge (ALJ) asked WilTel to supplement its application with more detail about the location and type of construction WilTel planned. On July 9, 2004, WilTel filed the requested supplement. WilTel explained the delay in supplementation on the ground that it "ha[d] not be[en] able to obtain detailed information about its planned construction until only recently."¹ In the supplement, WilTel asked for blanket approval – without Commission CEQA review – of spurs directly or indirectly connecting WilTel's

¹ *Supplement to Application of WilTel Communications, LLC to Amend its Certificate of Public Convenience and Necessity on an Interim Basis and Request for Expedited Ex Parte Relief*, filed July 9, 2004, at 2-3 (First Supplement).

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fiber optic network to new locations so long as 1) all construction is no more than five miles in length, 2) all construction is done inside existing rights of way, 3) WilTel notifies the Commission staff of each qualifying construction project prior to commencing construction, and 4) WilTel fully complies with any CEQA review required by local permitting agencies.²

WilTel filed a Second Supplement to its application on January 27, 2005.³ While it has since withdrawn the Second Supplement, in it WilTel proposed to enable the Commission to comply with CEQA by agreeing to conditions the Commission had imposed on certain other carriers in prior decisions. However, on March 8, 2005, WilTel sent another letter to the ALJ withdrawing its Second Supplement and indicating that it wished the Commission to render a decision solely on WilTel's original application and the July 9, 2004 First Supplement. We analyze the application on that basis below.

C. Discussion

Pursuant to authorization received in various Commission decisions, WilTel has already built certain aspects of its fiber optic telecommunications network in California.⁴ With this application, WilTel seeks to have its CPCN modified to allow it blanket authorization, without individualized Commission CEQA review, to construct certain spurs less than five miles in length within existing rights of way.

² *Id.* at 3.

³ *Second Supplement to Application of WilTel Communications, LLC to Amend its Certificate of Public Convenience and Necessity on an Interim Basis and Request for Expedited Ex Parte Relief*, filed January 27, 2005 (Second Supplement).

⁴ See D.99-05-022, D.99-10-062, D.00-06-035, D.01-08-052 and D.03-03-029.

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We have previously informed WilTel that, pursuant to its CPCN, it must obtain Commission authorization prior to commencing additional construction, and WilTel has accepted this requirement. As WilTel states in its application, “unlike its competitors, WilTel (under its current certificate) is not allowed to commence any construction on any new project until a final decision is adopted by the Commission.”⁵ WilTel notes that we have authorized other carriers to construct new facilities within existing rights of way without an amended CPCN.

In reviewing WilTel’s current application, we have reviewed our earlier assumptions regarding the limitations on WilTel’s authority. In our analysis of WilTel’s initial CPCN for facilities-based non-dominant interchange (“NDIEC”) authority, we find no restrictions on WilTel’s future authority to construct. (See *Williams Communications, Inc.* (1999) [D.99-10-062] 1999 Cal. PUC LEXIS 723.) Although WilTel’s CPCN only analyzes the particular facilities WilTel planned at the that time, it contains no limitations on WilTel’s future construction. Because Public Utilities Code section 1001 exempts extensions within a utility’s service territory from its approval requirements, WilTel is not required to return for Commission approval prior to constructing these extensions of its facilities.⁶

⁵ *Application of WilTel Communications, LLC to Amend its Certificate of Public Convenience and Necessity on An Interim Basis and Request for Expedited Ex Parte Relief*, filed May 3, 2004 (Application), at 2.

⁶ In relevant part, section 1001 provides: “No... telephone corporation... shall begin construction of a... line, plant, or system, or of any extension thereof, without having first obtained from the Commission a certificate that present or future public convenience and necessity require or will require such construction. This article shall not be construed to require any such corporation to secure such certificate for an extension within any city or city and county within which it has theretofore lawfully commenced operations..., or for an extension within or to territory already served by it, necessary in the ordinary course of business.”

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Moreover, there is no other Commission rule or other legal requirement that mandates WilTel obtain Commission authorization prior to constructing extensions of its facilities.

We acknowledge that the Commission previously believed, and communicated to WilTel, that WilTel could not construct additional facilities without Commission authorization. (See *Williams Communications, Inc.* [D.00-08-017] 2000 Cal. PUC LEXIS 559.) However, analysis of WilTel's CPCN and the applicable legal principles does not support this conclusion. Confusion in this area is not surprising. When the Commission first considered new WilTel construction of extensions, the Commission's policies concerning review of telecommunication carriers' construction projects had been undergoing substantial revisions, particularly in regard to Competitive Local Carriers ("CLCs"). (*Competition for Local Exchange Service* (1999) [D.99-12-050] 1999 Cal. PUC LEXIS 787.) Changing prior Commission practice, D.99-12-050 requires new CLC's to obtain specific Commission authorization prior to undertaking new construction. Because the new more stringent requirements only apply to more recently approved CLCs, there are now disparate review requirements for older and newer CLCs, as well as disparate review standards for certain NDIECs and CLCs.

Despite the varying standards, the CLC policies announced in D.99-12-050 never applied to WilTel. First WilTel is a NDIEC as opposed to a CLC, and even more significantly, WilTel's CPCN predates the policies adopted in D.99-12-050, and its CPCN does not incorporate the D.99-12-050 requirements. Although

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some NDIEC CPCNs contain the D.99-12-050 type of limitations concerning future construction,⁷ WilTel's CPCN does not.

Because WilTel is not required to obtain Commission approval of extensions within its service territory, the CEQA environmental review requirements are not triggered. We concede that we have treated various types of telecommunications carriers differently in the level of CEQA analysis we apply to their construction activities. This difference is not a function of any conscious effort to apply different environmental review standards to different carriers. Instead, the difference flows from the fact that CEQA applies to "discretionary" agency decisions. (Pub. Resources Code, § 21080 (a).) Where no Commission approval is required for a utility project, the Commission does not issue a discretionary decision, and CEQA, by its terms, does not apply.

Although we conclude that WilTel's CPCN contains no requirements that extensions of its facilities be approved by the Commission, we are mindful that it may be unwise environmental policy to allow WilTel to build all construction projects without Commission approval. This is the legal result of our initial approval of WilTel and Public Utilities Code section 1001, but it is not a result we intended. For this reason, while we are denying WilTel's request as set forth in its application to amend its CPCN, we will add the requirement that WilTel return to Commission for approval prior to constructing certain projects. In today's decision, we adopt the limitations listed by WilTel in its amended application. This is contrary to WilTel's request in that we are adding, rather than removing restrictions on its authority to construct. That is, WilTel must

⁷ See, e.g., *Power Telecomm, Inc.* (2004) [D.04-11-011] 2004 Cal. PUC LEXIS 537, Appendix A, ¶ 19.

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obtain Commission approval prior to constructing any facilities *other than* spurs directly or indirectly connecting its backbone network to new locations, which are (1) no more than five miles in length, and (2) inside existing rights of way. Moreover, WilTel must inform Commission staff about all construction it undertakes, and comply with any CEQA review local agencies require.

Therefore, we are denying WilTel's request to amend its CPCN on the basis that it CPCN does not contain the restrictions that WilTel and the Commission has assumed it does. To mitigate the impact of our conclusions, we will add restrictions on WilTel's authority to construct extensions without further Commission approval.

C. Categorization and Need for Hearings

In Resolution ALJ 176-334 dated May 27, 2004, the Commission preliminarily categorized this application as ratesetting, and preliminarily determined that hearings were not necessary. No protests have been received. Given this status public hearing is not necessary and it is not necessary to alter the preliminary determinations made in Resolution ALJ 176-3134.

D. Comments on Draft Decision

The draft decision of the Administrative Law Judge in this matter, as well as two alternate draft decisions ("May 31, 2005 Alternate" and "June 20, 2005 Alternate"), were mailed to the parties in accordance with Public Utilities Code section 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. WilTel filed comments on the draft decision and alternate drafts on May 5, 2005, June 8, 2005, and July 11, 2005. WilTel challenges the draft decision and the June 20, 2005 Alternate principally because they "perpetuate[s] discriminatory treatment of WilTel and similarly-situated carriers."

The Attorney General of the State of California requested leave to file comments on the draft decision of the ALJ (and the two alternate decisions), and

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in response to leave granted by the ALJ, filed comments on July 11, 2005. The Attorney General suggests the Commission should decide how to apply CEQA to different carriers, including WilTel, in the context of the Commission's CEQA rulemaking, instead of this individual application. WilTel filed reply comments to the Attorney General's comments on July 15, 2005, urging the Commission to move forward expeditiously with the CEQA rulemaking, but also asking the Commission to approve the May 31, 2005 alternate.

E. Assignment of Proceeding

Michael R. Peevey is the Assigned Commissioner and Sarah R. Thomas is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. WilTel seeks to amend its Certificate of Public Convenience and Necessity ("CPCN") to allow it to construct certain new projects, on an interim basis, without obtaining prior Commission approval.
2. Different telecommunications carriers' CPCNs contain different provisions concerning Commission review of further utility construction.
3. WilTel's CPCN, issued in D.99-05-022 and D.99-10-062, does not contain any limitations or restrictions on WilTel's authority to construct extensions of its facilities.
4. No protests have been filed.
5. A hearing is not required.
6. We have not resolved the issues raised in R.00-02-003.

Conclusions of Law

1. Public Utilities Code section 1001 does not require utilities to obtain Commission approval prior to constructing extensions within their service territory.

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2. WilTel's CPCN does not require it to obtain Commission approval prior to constructing extensions within its service territory.
3. No statute or Commission rule requires WilTel to obtain Commission approval prior to constructing extensions within its service territory.
4. After today's decision, WilTel will be required to obtain Commission approval prior to constructing extensions any facilities *other than* spurs directly or indirectly connecting its backbone network to new locations, which are (1) no more than five miles in length, and (2) inside existing rights of way.
5. CEQA review requirements are not triggered unless the Commission issues a discretionary decision concerning whether to approve a project.

O R D E R

IT IS ORDERED that:

1. The Application of WilTel Communications, LLC to Amend its Certificate of Public Convenience and Necessity on An Interim Basis and Request for Expedited *Ex Parte* Relief, is denied on the basis that its CPCN does not contain restrictions on future construction projects.
2. WilTel's CPCN is amended as follows: WilTel is now required to submit a CPCN application for construction activities that are not within existing rights of way or are more than five miles in length. WilTel is also required to notify the Commission staff of all construction projects prior to commencing construction and WilTel must comply with any CEQA requirements of local permitting agencies.
3. The restrictions imposed herein are interim, and will expire upon the issuance of a final decision in either R.00-02-003 or similar rulemaking

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promulgating CEQA rules applicable to all facilities-based telecommunications carriers.

4. This proceeding is closed.